Supreme Court, U.S.
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No. 99-901

In The

Supreme Court of the United States

Brentwood Academy,

Petitioner,

v.

Tennessee Secondary School Athletic Association and Ronnie Carter, Executive Director and Individually,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of *Amicus Curiae* Southeast Law Institute in Support of Petitioner Brentwood Academy

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23pp

QUESTIONS PRESENTED FOR REVIEW

"Whether the regulatory conduct of a nominally private secondary school athletic association, which 'establishes and enforces all of the rules by which high school teams and players, at both public and private schools, compete throughout the state of Tennessee,' . . . and whose 'membership consist[s] entirely of institutions located within the same State, many of them public institutions created by the same sovereign,' . . . constitutes state action under the Fourteenth Amendment and under 42 U.S.C. § 1983."

Brentwood Academy v. Tennessee Secondary Schools Athletic Association, et. al., **In the Supreme Court of the United States, No. 99-901, Petition For Writ of Certiorari, p. i.**

A. When such an association is controlled by public authorities who discriminate against nonpublic education, specifically religious based education, does that constitute state action and burden parental choice of education?

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I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Southeast Law Institute is an Alabama non-profit corporation interested in protecting the constitutional rights of persons, including the rights of religion, parental choice of education and equal protection through legal representation in the courts and evaluation of and comment on public policy in legislative, executive, and other administrative enactments. As a member of the Bar of this Court, Counsel to *amicus curiae* has participated in many related issues on behalf of other *amici curiae* before this Court.

As *amicus curiae*, the interest of the Southeast Law Institute is to defend the equal protection, religious and related fundamental constitutional rights of parents to choose nonpublic and specifically religious education as an alternative to public education and have protection from discriminatory state action in determining options and advantages in the education process. This *amicus curiae* is concerned with the status of an Alabama "athletic association" similar to the one in the case *sub judice*. As self-proclaimed private entities, such athletic associations violate important constitutional rights with virtual impunity.

Finally, this *amicus curiae* noted a singular lack of support in earlier filings by other *amici curiae* for the petitioner's position. On the other hand, there were numerous *amici curiae* filings in support of the respondent. There are constitutional interests at stake which are more

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[1] The parties have consented to the filing of this brief. Counsel for Southeast Law Institute authored this brief in its entirety. No person or entity, other than the Southeast Law Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

significant than the personal interests of the questioned associations.

II. SUMMARY OF ARGUMENT

State athletic associations are direct instruments of state education authorities for the control of all interscholastic athletics in a state. Public schools operated by the state are all included and cannot compete without membership. Nonpublic schools may join subject to the rules of the association.

Parents have the right to choose the educational method for their children. If they choose nonpublic education, particularly for religious reasons, they should not be discriminated against by state authorities. However, if they are, they should have a right of action and meaningful judicial review.

When state authorities in such athletic associations enact rules that benefit public schools and burden nonpublic schools, this violates constitutional rights of equal protection, religious freedom, parental choice of education, and other rights and privileges under the United States Constitution.

III. ARGUMENT

A. Parents' Rights and School Choice

The Sixth Circuit Court of Appeals' determination that the Tennessee Secondary School Athletic Association (TSSAA) is a private entity, burdens without meaningful recourse the parents' constitutional right to choose the method of educational instruction for their children. The right of parents to control the education of their children was first explicitly stated in *Meyer v. Nebraska*, 262 U.S. 390

(1923), when this Court found a parents' liberty interest guaranteed by the Fourteenth Amendment to be violated when a parochial school was denied the right to teach a foreign language to its students. Saying that "it is the natural duty of the parent to give his children education suitable to their station in life" (*id.* at 400), this Court found that the Nebraska legislature had "attempted materially to interfere with . . . the power of parents to control the education of their own." *Id.* at 401.

Relying on *Meyer*, very soon thereafter this Court addressed the parents' particular choice of educational method in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925). An Oregon law required children to attend only public school. A religious school and a military academy challenged the law. The religious school offered a uniquely religious education (*id.* at 532), while the military school offered a uniquely military education. *Id.* at 533. The schools challenged the state law on the basis that it contravened a liberty right guaranteed by the Fourteenth Amendment. The right was enunciated by this Court:

> "Under the doctrine of *Meyer* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right,

> coupled with the high duty, to recognize and prepare him for additional obligations."

Id. at 534.

American history demonstrates education in early America was nonpublic, viz., basically church and home schooling, or was public, but in the sense that it was controlled by parents. Despite the establishment of town schools, parents were so prominently involved in their children's education that it was often difficult to distinguish "home" from "school".[2] Public education, that is education provided through state support and control, increased to the point that by the Twentieth Century, it was the predominant method of education and had become a most important function of a state. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Nonpublic education, primarily in the nature of private preparatory or Catholic parochial schools coexisted. As a partial result of 1960's and later court cases removing religious influences from public schools,[3] religious based or church schools began to reappear as an important alternative choice of educational method.

With a sincerity no less important than the Amish in *Yoder*, *supra*, parents have worked within their churches to set up fully functioning and usually accredited church schools. In a world that is seen to be increasingly secular,

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[2] Lawrence Cremin, *American Education: The Colonial Experience, 1607-1783* (New York: Harper and Row, 1970), p. 192. *Also see*, William T. Davis, *History of the Town of Plymouth* (Philadelphia: J.W. Lewis & Co., 1885), p. 52.

[3] *Engle v. Vitale*, 370 U.S. 421 (1962) (removing daily prayer); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (removing Bible reading and the Lord's Prayer); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (holding unconstitutional anti-evolution statute); *Stone v. Graham*, 449 U.S. 39 (1980) (removing the Ten Commandments).

parents have chosen religious based education in order to give their children a complete education but with an appropriate religious world view.

As in many states, Alabama had a cognizable growth of religious based education. In recognition of the rights explained in *Meyer*, *Pierce*, and *Yoder*, in 1982 the Alabama legislature promulgated a number of laws recognizing the right of parents to make a choice for church school education. While public schools are required of the State of Alabama under Article XIV, Section 256, 1901 Constitution of Alabama, church schools are permitted as an educational choice as defined by Section 16-28-1, *1975 Code of Alabama*. In deference to the First Amendment, church schools are not required to register with or report to the state (*id.* Section 16-1-11), and they are recognized as alternative methods of education along with public schools. *Id.* Section 16-28-3. Other private forms of education are permitted, but with more regulation. *Id.* Section 16-46-5.

In more recent years, there has been a crisis in urban public education. With the growth of nonpublic education, particularly religious based schools, the parental right to choose the educational method has become more significant. Issues of school choice, use of public funds for private tuition, vouchers, tax credits and similar measures are currently being legislated and litigated. Whether public funds may ultimately be used for nonpublic education is one issue, but the increasing incidence and right of parental choice remains unaffected.

The parents' choice of alternative nonpublic education may be for one or several reasons, which might include a desire for religious based instruction, college preparation, a different educational environment, to escape zoned public education for scholastic, safety or other

reasons, or the appeal of a particular nonpublic program. Whatever the reason and choice of method, all include scholastic achievement and most involve athletic participation. Athletics are an integral and important part of the education process. See *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 98 and 122 (1984); *Allen v. Regents of University System of Georgia*, 304 U.S. 439, 449 (1938); *Todd v. Rush County Schools*, 133 F.3d. 984, 986 (7th Cir. 1998); *Knapp v. Northwestern* University, 101 F.3d. 473 (7th Cir. 1996); *U.S. ex rel. Missouri State High School Activities Association*, 682 F.2d. 147, 151 (8th Cir. 1982).

While school choice may depend primarily on scholastic needs or desires, the availability of scholarships through athletic excellence may be a significant concern of parents. This concern has more significance for low income families who may choose religious based education, while at the same time hoping for athletic excellence to result in a college scholarship for their gifted athletic child.

College athletes come from high schools. Most high schools are public with a lesser number private and an even lesser number religious. State athletic associations, such as the TSSAA and for the State of Alabama, the Alabama High School Athletic Association (AHSAA), are set up to handle all interscholastic athletic competition. This includes predominately public school competition, but permits nonpublic schools to participate as well. Regardless of choice of educational method, if a gifted student athlete wants recognition or desires rigorous competition, the school which he attends must participate in the statewide athletic association program.

B. Unconstitutional Treatment of Nonpublic School Choice

The issue in the case *sub judice* is whether such state athletic associations are state agencies and therefore subject to constitutional requirements, or are they merely private entities subject to the most minimal judicial review? It is in that same context that the issue in Alabama, as well as all other states, becomes one of parental choice, free exercise of religion and equal protection, similar to the free speech issue in the case *sub judice*. Appendix "A" is a letter explaining a recent change in "private school" classification (all nonpublic schools including church schools) in the AHSAA. The classification regulation that is referenced in the letter at Appendix "A" states:

> "High schools are divided into six classifications (1A, 2A, 3A, 4A, 5A, 6A) for competition in championship programs.
>
> Classification is based on Average Daily Membership (ADM) figures furnished by the State Department of Education for the upper three grades plus ninth grade holdbacks. The largest schools are placed in Class 6A, the next largest in Class 5A, etc.
>
> **Note:** Effective with the 2000-2001 school year, an index of 1.35 will be used to determine the enrollment of each private school for the next classification period (2001-2002). Each private school shall count 1.35 for classification purposes.

1999-2000 Handbook, Alabama High School Athletic Association, p. 66.

As an explanation for that provision, the letter at Appendix "A" suggests the reason for the multiplier is because private schools have a thirty-five percent higher level of student participation. This "classification" is the level of competition at which a school will play. The more the enrollment, the higher the classification, the fiercer the competition. This private school multiplier seems unfair and unbased on its face. Smaller private schools will be required to play larger public schools. This will penalize those students because of their parents' choice of nonpublic education.[4]

C. State Control of Athletic Programs

Why should a nonpublic school participating in the athletic program be penalized merely because its students are more dedicated to the task? In many of these cases there are issues of athlete recruitment and other methods by which nonpublic schools may get athletes while public schools must rely on zoned districts for their athletes. Assuming there is a debate about the reasonableness of the AHSAA rule, is there an appropriate forum with jurisdiction for review?

The Eleventh Circuit has not addressed whether the AHSAA is a state agency for federal constitutional purposes.[5] Nor has any Alabama case addressed whether, as

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[4] This *amicus curiae* realizes there is no evidence before the Court and this matter is only explained for the purpose of offering an example.

[5] Since October 1, 1981, the date when the Eleventh Circuit Court of Appeals was established, there has been no case addressing this issue. However, prior to that time, the Fifth Circuit Court of Appeals had determined that a state high school athletic association was a state

a matter of state or federal law, the AHSAA is a state agency. The only reference to such an issue was in *Kubiszyn v. Alabama High School Athletic Association*, 374 So.2d. 256, 257 (Ala. 1979), where the Alabama Supreme Court stated it would not decide such an issue, but in conflicting statements said it would not interfere with the decision making process of the association:

> We need not decide whether there could be circumstances under which the Constitutions of the United States and the State of Alabama would be violated by restrictions on a student's participation in high school sports . . .
>
> * * *
>
> If officials of a school desire to associate with other schools and prescribe conditions of eligibility for students who are to become members of the school's athletic teams, and the member school's vest final enforcement of the association's rules and boards of control, then a court should not interfere in such internal operation of the affairs of the association.

This leaves the legal question open and schools, public and nonpublic, subject to the dictates of the AHSAA as a self-proclaimed "private agency." *1999-2000 Handbook, Alabama High School Athletic Association*, p. 72; see also http://www.ahsaa.com.

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agency. *Louisiana High School Athletic Association v. St. Augustine High School*, 396 F.2d. 224, 227 (5th Cir. 1968). This decision would be applicable to the Eleventh Circuit Court of Appeals pursuant to *Bonner v. City of Pritchard*, 661 F.2d. 1206 (11th Cir. 1981).

The state athletic associations are entities to which the state has delegated its authority to organize all public secondary athletic activities in the state. The AHSAA, like the TSSAA and similar associations, are programs controlled and operated by public school authorities. They are not private organizations like the Boy Scouts of America or the South Boston Allied War Veterans Council. See *Boy Scouts of America v. Dale*, 734 F.2d. 1196 (N.J. 1999), *cert. granted*, _____ U.S. _____, 120 S.Ct. 865 (2000); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

The governance of the AHSAA and its Constitution, By-laws, and other regulatory provisions indicate its symbiotic familial relationship with state public school and education agencies and employees. The AHSAA is regulated by a thirteen member Central Board of Control composed of twelve public school employees and one Alabama State Department of Education employee, and a thirty-two member Legislative Council consisting of four members from each of eight district boards in the state which currently has thirty-one public school employee board members and only one private school employee board member. See http://www.ahsaa.com. Employees of the AHSAA are members of the Teacher's Retirement System of Alabama, just like public school teachers. Section 16-25-7(a), *1975 Code of Alabama.*

It is not statutes or regulations that make the associations state actors. It is the authority the states have delegated to them and their conduct which is state action and therefore, makes them persons subject to 42 U.S.C. § 1983 and other process. *Walsh v. Louisiana High School Athletic Association*, 616 F.2d. 152, 156 (5th Cir. 1980).

D. Unconstitutional Discrimination Without Remedy

The reason for providing this information to the Court is to show that like Tennessee, Alabama has an athletic association which is highly regulated by state officials. It conducts all of the athletic activities of all public schools in the state, along with those nonpublic schools which wish to participate. It dictates requirements and makes rulings which are discriminatory to nonpublic choices of education, but without a meaningful remedy. This *amicus curiae* would agree that the AHSAA, or any other state association, whether it is public or private, may make rules to which the school who wishes to participate must agree, otherwise, they should not join the association. However, once the state controlled association makes those rules and invites participants, there should not be unequal treatment or hostility toward nonpublic alternative choices of education.

In addition to the right under the liberty interest of the Fourteenth Amendment of parents to choose education method (*Meyer*, 262 U.S. at 400 and *Pierce*, 268 U.S. at 534), is the right to base the choice on religious grounds. *Yoder*, 406 U.S. at 214. If the parents' choice is weighed with knowledge that their child will not be able to fairly compete in interscholastic athletics, the freedom of that educational choice and the freedom of religious exercise is unconstitutionally burdened. If parents believe the opportunities their child may receive in the nonpublic religious school will be substandard, then the choice is not really free and not really a right. Parents do not receive equal protection of the law and are denied religious freedom because their religious choice has put them in an unequal position.

Parents should not be required to choose between a secular education with athletics and a religious education without athletics for their child. This is particularly true when the dilemma is caused by a state agency acting without a proper reason, whether its interest be legitimate or compelling. In reality, such athletic associations are state agencies which cannot exhibit hostility and bias toward religious and private entities, but must maintain neutrality. Specifically for religious based schools, these associations are no different than other public agencies who have been constrained by this Court in cases such as *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 and 839 (1995) (maintaining lawful boundaries of the forum set by the state and the guarantee of neutrality in governmental policies and benefits towards religion) and *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 704 (1994) (requiring the civil power to be exercised in a neutral manner to religion and the making of governmental benefits available to religious persons and groups). Additionally, if a church school cannot equally compete, this is a direct burden which violates not only the First Amendment to the U. S. Constitution, but the Alabama Religious Freedom Amendment, Amendment No. 622, 1901 Constitution of Alabama:[6]

> A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it burdens the free exercise of religion.

Yoder, 406 U.S. at 320.

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[6] Voters in Alabama adopted the "balancing" or "compelling interest test" commonly applied prior to *Employment Division v. Smith*, 494 U.S. 872 (1990), at a November 3, 1998 referendum.

The hostility is obvious in the case *sub judice* when the TSSAA stated at page 15 of its Brief in Opposition to the Petition for Writ of Certiorari that ". . . while it may be unpalatable to Brentwood Academy to withdraw from TSSAA and no longer be in a position to hold itself out as a TSSAA football champion, Brentwood Academy nevertheless retains the option of withdrawing from TSSAA if it does not wish to comply with the TSSAA ruling." This hostility is endemic and pervasive in the competition between public and nonpublic education, both academically and athletically. The dominance of public schools in the management of athletics through their so-called private associations is an unlawful and unfair advantage, removing from them constitutional restrictions and permitting them to be self-governing without meaningful court review.

When this happens, there is an unconstitutional discrimination by persons or entities to whom the state has delegated authority to do what the state ordinarily would do. These so-called private associations believe they can discriminate with impunity since they are not state actors. This is an ingenious device, if it is allowed to work.

It is ludicrous to suggest states would do away with interscholastic athletics if there were not these private associations. Clearly, athletics is an integral part of the educational process. While it is alleged the TSSAA bars independent schools from contacting students and therefore denies their speech rights, the AHSAA prescribes unequal rules unconstitutionally burdening parental choice of educational method which is particularly egregious when the choice is based on a religious belief or compulsion. Both are intended to diminish nonpublic competition, but without constitutional scrutiny.

Public officials must be accountable. Healthy competition among alternative school methods, both scholastically and athletically, is at stake. For whatever reasons parents exercise there constitutional rights to choose an alternate to public education, those parents should have the assurance that their children will receive all of the same benefits and opportunities to compete in the public square without unconstitutional treatment.

IV. CONCLUSION

This *amicus curiae* urges the Court to grant the relief sought by the petitioner and find the TSSAA to be a state agency. Upon such finding, all similar athletic associations in the states will be required to treat parents and alternative education with the same fairness otherwise required of states under the Constitution.

For the reasons set forth above, *amicus curiae*, the Southeast Law Institute, respectfully suggests that the judgment of the Sixth Circuit Court of Appeals be reversed and an order be entered as suggested above.

Respectfully Submitted,

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APPENDIX

Appendix "A"

AHSAA
Alabama High School Athletic Association
P.O. Box 5014
926 Pelham Street
Montgomery, AL 36103-5014
PHONE: (334) 242-5654 · FAX: (334) 240-3389

Dear (name withheld by request):

I am in receipt of your letter expressing your dismay with the passage of the enrollment index of 1.35 used for private school enrollment for the 2000-2001; 2001-2002 classification period. After much discussion by the Central Board of Control and the Legislative Council at its March meeting, an attempt was made to keep the private schools as participating members of the Alabama High School Athletic Association as they have been for many, many years.

It is the understanding of this office, that most private schools are selective in their enrollment practices, that some students may or may not qualify for various reasons and that their application for enrollment may be denied. It is also a known fact that private schools charge tuition fees in order to attend those institutions, thereby eliminating some students whose parents may not be able to afford to send their sons or daughters to a private institution. In contrast, a public school must enroll any individual within their school's zone regardless of mental aptitude, financial wealth, or any of the character traits that may eliminate students from private school enrollment.

A study of participation in interscholastic athletics within the public schools revealed that 33% of those students enrolled participate in interscholastic athletics. That same study within the private school sector reveals that 68% of the students enrolled participate in interscholastic athletics. This study as well as the above statements forms the basis for using the 1.35 index.

Certainly the Central Board of Control and the Legislative Council are willing to hear from any member school within the state, as I am, concerning this matter. The committee that was put into place by the President of the Central Board of Control will continue to address these problems and changes will be made in the future that will better address all concerns.

I look forward to meeting with you if you still request a conference in order to discuss this matter. Please call to set up a suitable time for us to meet. Thank you and (name withheld by request) Christian School for your spirit of cooperation in working to resolve this matter.

Sincerely yours,

s/Daniel L. Washburn

Daniel L. Washburn
Executive Director